

133355

**SCHNADER HARRISON
SEGAL & LEWIS LLP**

ATTORNEYS AT LAW

1300 I STREET, N.W. ■ 11TH FLOOR EAST ■ WASHINGTON, DC 20005-3314

202-216-4200 ■ FAX: 202-775-8741

<http://www.schnader.com>

Roy Goldberg
Direct Dial: 202-216-4227
Direct Fax: 202-775-8741
Internet Address: rgoldberg@schnader.com

June 26, 2001

VIA COURIER

Ms. Donna McLean
Assistant Administrator for Financial Services/
Chief Financial Officer
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591
(202) 267-9105

DEPT. OF TRANSPORTATION
DOCKETS
01 JUN 26 PM 2:03

RE: Fees for FAA Services for Certain Flights – Docket No. FAA-00-7018 – 118

Dear Ms. McLean:

Enclosed please find the “Supplemental Comments of Air Transport Association of Canada, Air France, Air New Zealand, British Airways, KLM Royal Dutch Airlines, Lufthansa German Airlines, LTU and Qantas Airways in Response to New Government Submissions Regarding FAA Cost Accounting System” for filing in the above docket.

Respectfully submitted,


Roy Goldberg
Counsel for Air Transport Association of Canada

and on behalf of Air France, Air New Zealand,
British Airways, KLM Royal Dutch Airlines,
Lufthansa German Airlines, LTU, and Qantas
Airways

Enclosure

cc: (2 copies)
U.S. Department of Transportation Docket Section
Docket No. FAA-00-7018
400 Seventh Street, S.W.
Washington, D.C. 20590

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION**

_____)
Fees for FAA Services for Certain Flights)
_____)

Docket No. FAA-00-7018

**SUPPLEMENTAL COMMENTS OF AIR TRANSPORT ASSOCIATION
OF CANADA, AIR FRANCE, AIR NEW ZEALAND, BRITISH AIRWAYS,
KLM ROYAL DUTCH AIRLINES, LUFTHANSA GERMAN AIRLINES,
LTU AND QANTAS AIRWAYS IN RESPONSE TO NEW GOVERNMENT
SUBMISSIONS REGARDING FAA COST ACCOUNTING SYSTEM**

These supplemental comments are submitted on behalf of the above-named parties in response to two documents placed by FAA into the above-referenced docket on June 6, 2001. Both of these documents pertain to the FAA's recently developed cost accounting system ("CAS"), and its relevance to the overflight fees that are the subject of this proceeding: (1) the "Federal Aviation Administration Response to the Office of Inspector General Report Status Assessment of FAA's Cost Accounting System and Practices," dated May 17, 2001 ("FAA May 17 Response") (Docket Doc. No. 115); and (2) a memorandum dated June 4, 2001 from Kenneth M. Mead, DOT Inspector General regarding "FAA Response to OIG's Report on Status Assessment of FAA's Cost Accounting System and Practices" ("IG June 4 Reply") (Docket Doc. No. 116) (collectively, the "New CAS Submissions").

1. **Nothing in the New CAS Submissions Changes the Fundamental Fact that the FAA's Current Overflight Fees Are Not Valid Because They Are Based on a Cost Accounting System Found to be Not Credible or Effective.**

While the New CAS Submissions purport to clarify certain aspects of the Inspector General's review of the FAA's cost accounting practices, they do not alter the overriding fact that the FAA's overflight fees are based on a fundamentally flawed cost accounting system. The overflight fees thus violate the requirement in 49 U.S.C. § 45301(b)(1)(B) that each of the fees must be directly related to FAA's costs of providing the services rendered to overflights. In other words, nothing in the documents submitted on June 6 diminishes the conclusions contained in our pleadings regarding the cost accounting system which we previously filed both in the pending litigation in the U.S. Court of Appeals and in this docket.¹

In publishing the Interim Final Rule for overflight fees ("IFR") in the *Federal Register* on June 6, 2000, the FAA made it clear that the new fees were predicated entirely on its new cost accounting system. *See* Docket Doc. No. 2 ("[o]nly recently has the FAA's new Cost Accounting System provided this [cost] information and only now can the FAA proceed with rulemaking as directed by 49 U.S.C. 45301"); *see also* the accompanying Fee Development Report, May 26, 2000 (Docket Doc. No. 4) (the "*cost accounting system developed the cost information for the agency's enroute and oceanic air traffic services,*" and "[t]his cost information is the basis from which *the agency's overflight fees have been derived*") (emphasis added).

¹ See Letter to FAA dated May 18, 2001 attaching those pleadings, Docket Doc. No. 112 (which is incorporated herein).

The DOT Office of Inspector General, however, in its audit of the CAS dated February 28, 2001,² reported to Congress that the FAA's cost accounting System is not "effective and credible" (Report at 4), cannot "produce accurate and reliable results for specific activities and services," (*Id.* at 2), and relies on "outdated standards and limited studies to estimate labor cost" for air traffic control services. (*Id.* at 17) The Inspector General also reported that "the lack of internal controls brings into question the reliability of the amounts reported for specific FAA activities and services." (*Id.*) Significantly, the Inspector General found that the FAA's cost accounting system cannot allocate costs to individual services, such as the enroute and oceanic air traffic control services used by overflights:

If FAA ever needs the actual cost of specific activities and services, such as communication efforts related to En Route and Oceanic services, the cost accounting system must be modified to accumulate cost at this level of detail. *The system has not been designed to provide this type of information.* (*Id.* at 18, emphasis added.)

In sum, in the February 28 report the Inspector General found that the cost accounting system on which the overflight fees are based is not credible or accurate; that the FAA does not reliably know its costs; and that FAA has no foundation for the critical assumptions underlying the fee-setting methodology used in the IFR.

In its initial response to the IG Report, dated April 10, the FAA did not challenge these devastating findings.³ Nor does the FAA's May 17 Response refute the Inspector General's basic conclusions. Instead, the May 17 Response seeks clarification that the

² "Status Assessment of FAA's Cost Accounting System and Practices" ("February 28 IG Report").

³ "Federal Aviation Administration Response to the Office of Inspector General Status Assessment of FAA's Cost Accounting System and Practice," April 10, 2001.

Inspector General “did not intend to suggest” in the February 28 Report “that the CAS data are inadequate or insufficiently precise to support Overflight fees.” May 17 Response at 1.⁴ Significantly, however, the IG’s June 4 Reply provides no such clarification. Thus, while FAA expressly asked the Inspector General to state affirmatively that the CAS data are adequate and sufficiently precise to support the overflight fees, *the Inspector General did not do so.*

The IG’s June 4 Reply does state that its February 28 Report “was not an audit of FAA’s compliance with the overflight fee statute, and therefore should not be used as a basis to support or attack the overflight fees in the Interim Final Rule.” IG Reply at 1. But this in no way diminishes the fact that FAA’s fees are premised on a cost accounting system that the Inspector General has found to be fundamentally flawed. Of course the Inspector General’s February 28 Report does not constitute a *legal opinion* as to the validity of the fees. We have never contended that it does. But, the IG’s Report does represent the authoritative findings of an independent governmental body designated by Congress to audit the very cost accounting system on which the FAA itself says its overflight fees are based. The FAA cannot reasonably claim that anything in the June 6 docket submissions renders the findings in the IG’s February 28 Report any less relevant or less damaging to the validity of the fees.

The findings in the IG’s February Report are undeniably relevant as to whether the overflight fees are in fact directly related to FAA’s costs of providing services to overflights. If FAA does not with confidence know what those costs are – as the IG

found – then fees premised on those costs obviously cannot be “directly related to” the FAA’s actual costs of servicing overflights and are therefore invalid. Similarly, any future fees established by FAA under a “final final rule” would also be invalid if they are premised on CAS data that are not reliable or credible. In order to meet the requirements of the statute, FAA must ensure that any future fees must be directly related to FAA’s actual costs of providing services to overflights -- *and those costs must be demonstrably accurate, reliable, and credible.*

2. The December 1999 Inspector General Report Does Not Validate the Overflight Fees.

The FAA’s May 17 Response suggests that the Inspector General’s December 17, 1999 report (No. FE-2000-024) somehow validates the overflight fees in the IFR. Specifically, the May 17 Response states that in developing the IFR, FAA “concurred with the * * * recommendations” in the December 1999 IG Report, and “took action to implement them * * *.” FAA May 17 Response, at 1.

However, the IG’s June 4 Reply makes clear that the December 1999 IG Report does not provide the support for the development of the overflight fees that FAA now claims. The June 4 Reply emphasizes that the Inspector General “*did not audit the support and assumptions for the FY 1999 data used to calculate the overflight fees in the Interim Final Rule.*” IG Reply, at 1-2 (emphasis added). Thus, FAA cannot legitimately rely upon the December 1999 IG report as support for the current overflight fees, particularly in light of the findings of the February 2001 report, issued 14 months later,

⁴FAA adds that “[t]o the extent that the [February 28 IG Report] could be construed negatively with respect to FAA’s ability to support Overflight fees based on the CAS, we will address that in the Final Rule.” *Id.*

that the cost accounting system on which the fees are premised is not capable of producing credible or reliable results. For the same reasons, FAA cannot rely on the December 1999 IG report to justify future overflight fees in a “final final rule.”

3. **The FAA Must Account for the Fact that it Has Been Overcharging Air Carriers under the IFR.**

The IG’s June 4 Reply makes a troubling revelation: FAA made a significant accounting error in developing the costs used to set the overflight fees in the IFR. The IG Reply states that, as a result of an “audit of the cost accounting system for FAA’s Research and Acquisitions line of business in FY 2000,” the Inspector General “found that Research and Acquisitions’ FY 1999 costs [on which the overflight fees were based] required adjustment because they had been overstated due to an accounting error.” IG Reply at 2. Accordingly, the Inspector General states that “as part of the Final Rule, FAA should address the effect of the lower FY 1999 costs on the fees already charged.” *Id.* We have reason to believe that this accounting error overstates FAA’s costs by several hundred million dollars.

Even assuming *arguendo* that the FAA could lawfully impose overflight fees in the manner it did, the Inspector General’s discovery of this error means that air carriers have been significantly overcharged under the IFR for the last 10 months. In addition, the error heightens our concern about the accuracy of FAA’s fee-setting methodology generally. Accordingly, we request that the FAA provide the following information:

- a. State in detail the magnitude, source, and reasons for the error identified by the Inspector General.
- b. State whether the error resulted from any operation or deficiency of the FAA’s cost accounting system.

c. State the dollar impact of this error on the overflight fees established by the IFR.

d. Describe the steps FAA undertook to ensure that no similar accounting errors were made in other respects when setting overflight fees under the IFR.

e. Describe the steps FAA has taken, or will take, to ensure that no similar accounting errors are made in setting overflight fees in connection with a “final final rule” on overflights.

f. State how FAA intends to compensate air carriers for the overcharges that occurred as a result of the accounting error.

We request that FAA provide this information to the public as soon as possible, as it will assist us in understanding the FAA’s methodology and preparing further comments. This information will also bring needed transparency to the FAA’s fee-setting process.

TIMELINESS OF SUPPLEMENTAL COMMENTS

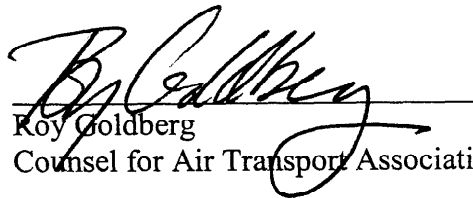
These supplemental comments obviously could not have been submitted by the FAA’s previously-designated comment date of December 26, 2000 because the New CAS Submissions were not generated and placed in the docket until very recently. The FAA has stated, both in its June 6, 2000 Federal Register notice and its October 27, 2000 notice extending the comment period, that comments filed after the closing date “will be considered to the extent practicable.” For that reason, and because these comments are directly relevant to the FAA’s development of a “final final rule” for overflight fees, the FAA should fully consider these supplemental comments before taking further action in this proceeding.

CONCLUSION

For the foregoing reasons, any further action taken by the FAA in this proceeding should be consistent with these supplemental comments.

June 26, 2001
Washington DC

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy Goldberg", is written over a horizontal line.

Roy Goldberg
Counsel for Air Transport Association of Canada

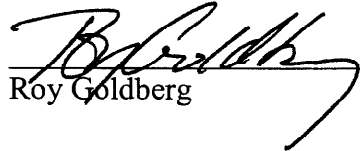
and on behalf of Air France, Air New Zealand,
British Airways, KLM Royal Dutch Airlines,
Lufthansa German Airlines, LTU, and
Qantas Airways

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2001 I caused a true and accurate copy of the foregoing document to be served via hand on the following persons:

Ms. Donna McLean
Assistant Administrator for Financial Services/
Chief Financial Officer
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

U.S. Department of Transportation Docket Section
Docket No. FAA-00-7018
800 Seventh Street, S.W.
Washington, D.C. 20590 (2 Copies)



Roy Goldberg